1987

The State of Utah v. Claude Donald Harman : Reply Brief

Utah Court of Appeals

David L. Wilkinson; Utah Attorney General; Attorney for Respondent.
Edward K. Brass; Attorney for Appellant.

BRIEF

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)OCKET NO. 870290-CA

IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Case No. 870290-CA
	)	(Priority No. 2)
CLAUDE DONALD HARMAN,	)	
	)	
Defendant-Appellant.	)	

REPLY BRIEF

Appeal from a conviction of attempted tampering with a witness, a Class A misdemeanor, in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Raymond S. Uno, presiding.

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IN THE UTAH COURT OF APPEALS

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REPLY BRIEF

SUMMARY OF ARGUMENT

The purpose of this reply brief is to respond to what appellant contends are factual and legal inaccuracies in the respondent's brief. The appellant will detail the factual inaccuracies and will reply to the third point of the respondent's brief. Otherwise, the appellant relies upon his original brief.

FACTUAL DISPUTES

In a fairly critical misstatement or omission of material fact, the respondent states that the appellant ". . . further ordered Tolman to shit-can, destroy, deep-six, shred, get rid of, and tear up. . ." the report which was the subject of the evidence tampering charge (Respondent's Brief, p. 7). Respondent fails to state, however, that it was only Tolman's claim that Harman had made such statements; that Tolman made the claim in surreptitious conversations with a newsman; and

that Tolman denied that Harman ever made any such statements in private, contemporaneous conversations with friends.

Respondent erroneously claims that Tolman gave one Dean Larsen "a courtesy copy of the report as a matter of inter-agency cooperation," (Respondent's Brief, p. 7). The report was, in fact, given to Larsen after Larsen solicited Tolman's support for his conclusion as to the fire origin (Appellant's Brief, p. 6). It was also given to Larsen because he was Tolman's friend (Id.). Finally, it was given to him in direct contravention of an office policy against dissemination of reports outside the office (Exhibit 23, Addendum to Appellant's Brief).

A final factual inaccuracy in the respondent's brief is the claim that the appellant "failed to pursue his motion for a bill of particulars" and that the ". . .trial court did not deny defendant's motion but simply did not rule due to defendant's apparent abandonment," (p. 19). The correct facts are that the State refused to respond to the request for a bill of particulars and the Court denied it (R. 24, R. 160).

ARGUMENT

REPLY TO POINT III

THE LOWER COURT ERRED IN REFUSING TO ORDER THE STATE TO PROVIDE A BILL OF PARTICULARS.

The State relies on the recent case of State v. Ramon, 736 P.2d 1059 (Utah App. 1987), as support for the proposition that the lower court correctly denied the appellant's

motion for a bill of particulars. The appellant sought the bill to determine the specific method by which he was alleged to have tampered with evidence. Both the statute and the indictment provide for alternative methods for the commission of the offense. Ramon actually supports the argument that the bill should have been ordered.

A bill of particulars ". . .is a pleading on the part of the state which limits or circumscribes the area or field, the transaction, as to which the state may offer evidence," State v. Spencer, 117 P.2d 455, 458 (Utah, 1941). "If an information does not adequately notify an accused of what he or she is charged with, a defendant has a right to a bill of particulars. . .the granting of a motion for a bill of particulars in such circumstances is not discretionary. . .an accused is entitled to whatever information the prosecutor has that may be useful in helping to fix the date, time, and place of the alleged offense," State v. Robbins, 709 P.2d 771, 773 (Utah, 1985).

Ramon demonstrates the importance of the requested bill of particulars to the present case. Ramon recognized that a single theft by receiving statute, §76-6-408(1), proscribed two different types of conduct, theft "by receiving" property and theft "by concealing" property. This Court reversed Ramon's conviction when the State amended the information on the eve of trial to change the charge from the "receiving" clause to the "concealing" clause.

Given the decision in Ramon, the evidence tampering statute may define as many as four offenses. Evidence tampering is committed by "altering, destroying, concealing, or removing" the evidence, §76-8-510. The appellant was entitled to know which of the ways the offense was committed. The appellant was also entitled to know any information which would assist him in fixing the date the offense allegedly occurred, according to Robbins. The indictment merely stated "during August, 1983." The failure of the lower court "to limit or circumscribe the area or field. . .as to which the state may offer evidence," Spencer, Id., resulted in the appellant not knowing to this day on what date the offense occurred or how it was committed.

CONCLUSION

The denial of the motion for a bill of particulars, in effect, denied the appellant due process. It was error not to specify when and how the offense was said to have occurred. Therefore, a new trial should be granted.

Dated this 20 day of June, 1988.

Edward K. Brass

EDWARD K. BRASS
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Reply Brief were mailed, postage prepaid, to Dan R. Larsen, Assistant Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on this 20 day of June, 1988.

Edward K. Brass